

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
	:	
of	:	
	:	
LOUIS CAMBRIA	:	
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1981	:	
through May 31, 1982.	:	
	:	DETERMINATION
	:	
In the Matter of the Petition	:	
	:	
of	:	
	:	
AMELIA CAMBRIA	:	
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1981	:	
through May 31, 1982.	:	

Petitioner Louis Cambria, 208 Sterling Avenue, Buffalo, New York 14216, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1981 through May 31, 1982 (File No. 51418).

Petitioner Amelia Cambria, 208 Sterling Avenue, Buffalo, New York 14216, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1981 through May 31, 1982 (File No. 46354).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on February 3, 1987 at 10:45 A.M., with all briefs to be submitted by April 15, 1987. Petitioners appeared by Daniel G. Tronolone, Esq., P.C. (John B. Surgalla, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

## ISSUE

Whether petitioners were persons required to collect and pay over sales taxes on behalf of Cambria's Theater District Cuisine, Ltd. d/b/a Cambria's Old Spain within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law during the period at issue herein.

## FINDINGS OF FACT

1. On June 20, 1983, following an audit, the Audit Division issued notices of determination and demands for payment of sales and use taxes due to Amelia Cambria and Louis Cambria. Each notice asserted \$109,881.53 in tax due for the period June 1, 1981 through May 31, 1982, plus penalty and interest. The tax asserted due from petitioners was based on the results of an audit of Cambria's Theater District Cuisine, Ltd. d/b/a Cambria's Old Spain (the "corporation"), and upon the assertion that petitioners were personally liable for sales tax due from the corporation pursuant to sections 1131(1) and 1133 of the Tax Law.

2. Petitioners presented no evidence to refute the results of the audit.

3. The corporation commenced operations in December 1980 under the name Cambria's Old Spain, a restaurant located at 654 Main Street, Buffalo, New York. Petitioner Louis Cambria became involved with the enterprise prior to its incorporation. Although not an investor himself, Mr. Cambria became involved with the corporation's investors prior to the incorporation because he had developed a reputation of some standing in the Buffalo area as a restaurateur. At hearing, Mr. Cambria indicated that the enterprise was initially his idea, stating: "I picked up the investors. I started it."

4. Petitioners' reputation led to the corporation's use of their name in an effort to attract business. Mrs. Cambria had been involved in the restaurant business as a cook for approximately 25 years and Mr. Cambria had been involved in the restaurant business "for some time", having been involved in a restaurant which "was rated one of the top ten years back". Additionally, Mr. Cambria's reputation was such that, as he stated at hearing, the City of Buffalo wanted him to "open up the Theater District because of the draw [he] made".

5. Mr. Cambria was elected Chairman of the Board of Directors of the corporation at its

inception and remained Chairman throughout the period of his association with the corporation. He regularly attended board meetings and was entitled to vote at such meetings.

6. The officers of the corporation at the time the restaurant commenced operations were as follows:

John Varecka - President  
Carolyn Varecka - Vice-President  
Amelia Cambria - Treasurer

7. Prior to the commencement of operations, Mr. Cambria hired the restaurant's staff. He also hired an accountant for the corporation. Subsequent to the restaurant's commencement of operations, Mr. Cambria was involved in the hiring and firing of personnel, acting in consultation with the restaurant's manager before taking action.

8. Although he did not consider himself an investor in the corporation, Mr. Cambria did provide the corporation with the use of "a lot of my personal equipment that I brought in there from my other restaurants". Subsequent to his departure from the corporation, Mr. Cambria was unable to retrieve this equipment.

9. Mr. Cambria had the authority to sign checks on the corporation's behalf throughout the period of his association with the corporation. This authorization extended to both the corporation's regular checking account and its payroll account. Mr. Cambria recalled going to the local bank offices to sign the signature cards for these accounts, but stated that he could not recall signing any corporate checks. Mr. Cambria subsequently stated that he "could have signed a few" expense checks for the corporation.

10. Mr. Cambria worked at the restaurant during the evening from approximately 6:00 P.M. through closing at midnight or 2:00 A.M. His day-to-day duties involved greeting patrons, remaining on the floor of the restaurant and generally making himself visible. Mr. Cambria considered himself the public relations director of the corporation. He did not receive a salary for the performance of these duties. He was employed elsewhere, where he was paid a salary, during regular business hours.

11. The day-to-day management of the corporation's books and records during the period

at issue was handled by its bookkeeper. This individual also prepared all tax returns on behalf of the corporation. Mr. Cambria did not sign any tax returns on the corporation's behalf, nor did he review the corporation's books and records.

12. The president of the corporation was in charge of day-to-day management. This individual signed most checks on the corporation's behalf, including payroll checks.

13. Mr. Cambria was not directly involved in the determination of which creditors of the corporation would be paid, although, on occasion, certain of the corporation's creditors approached him regarding payment. On such occasions, Mr. Cambria spoke with the corporation's bookkeeper or manager on the matter.

14. The corporation experienced financial problems soon after its commencement of operations and, in June of 1981, the Board directed the formation of a financial committee to oversee the corporation's finances. At hearing, Mr. Cambria stated that he was not named to this committee. The financial committee did not report to Mr. Cambria with any regularity regarding the corporation's finances.

15. Mr. Cambria's relationship with the corporation was terminated by vote of the Board of Directors on January 11, 1982. He had no involvement with the corporation subsequent to his termination.

16. Mr. Cambria contended that his responsibilities were limited to those involving his "greeting" duties, as described in Finding of Fact "10". He further contended that he was named Chairman of the Board because of his name and that he was a figurehead Chairman. He did state, however, that the financial committee directed him to "cut down on the payroll" by firing employees. At hearing, Mr. Cambria was unsure whether or not he had complied with this directive stating: "I don't recall if I have or not because we were getting parties and busy, I don't recall if I did that". When asked at hearing whether he had, on any occasion, hired or fired anyone without consulting someone else, Mr. Cambria replied that he had always consulted with the manager. Additionally, when asked who had assumed the duties of John Varecka after Mr. Varecka had been dismissed from the corporation in October 1981, Mr. Cambria replied, "I

think Jimmy Allen took over and directed Buddy Carroll and Carol [Ziemba] to do that because I wasn't there all the time".

17. Petitioner Amelia Cambria was involved with the corporation from its inception through January 1982. She held the title of treasurer, but had no duties in connection with that office. At hearing, she stated that she believed she was empowered to sign checks on behalf of the corporation, but at no time did she exercise that power.

18. Mrs. Cambria's duties were those of an employee. She was the preparation cook at the restaurant preparing food for cooking. She worked 16 hours a day, 7 days a week at the restaurant and was paid about \$500.00 dollars a week.

19. Mrs. Cambria was not a director of the corporation. She had no involvement with the corporation's bookkeeping, the preparation of the returns or the determinations as to which of the corporation's creditors were to be paid. She also had no authority to hire or fire employees.

20. Mrs. Cambria's employment with the corporation was terminated in January 1982.

21. The corporation's certificate of registration for sales tax purposes included Mrs. Cambria among its principal officers or owners, but did not include Mr. Cambria.

#### CONCLUSIONS OF LAW

A. That, in general, section 1133(a) of the Tax Law imposes upon any person required to collect tax imposed by Article 28 of the Tax Law, personal liability for the tax imposed, collected, or required to be collected. Section 1131(1) of the Tax Law defines persons required to collect tax to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28.

B. That the determination of whether an individual is a person or officer under a duty to act for the corporation is based upon the facts presented (Matter of Cohen v. State Tax Commission, 513 NYS2d 564 [3d Dept 1987]). Pertinent factors in making the determination include the authority to hire and fire employees, status as an officer, director or stockholder, authority to sign checks and prepare returns, responsibility for management and derivation of substantial income from the corporation (see \_\_\_ 20 NYCRR 526.11[b][2]; Matter of

Blodnick v. New York State Tax Commn., 124 AD2d 437; Matter of Cohen v. State Tax Commn., supra, Matter of Capoccia v. New York State Tax Commn., 105 AD2d 528, 529).

C. That, based on these standards, the Audit Division properly determined that petitioner Louis Cambria was a person required to collect tax on behalf of the corporation within the meaning of section 1131(1) of the Tax Law, and was therefore personally liable pursuant to Tax Law § 1133(a) for the tax required to be collected by the corporation. This petitioner was Chairman of the Board of Directors of the corporation; he had and exercised corporate check-signing authority; he had and exercised authority to hire and fire employees; he spent a considerable amount of time at the restaurant during its hours of operation; and he had involvement, albeit limited involvement, in the payment of certain of the corporation's creditors. Although not involved in the day-to-day financial affairs of the corporation or in the preparation of tax returns, the evidence presented indicates, notwithstanding petitioner's protestations to the contrary, that Mr. Cambria played an active role in the corporation's overall management. Specifically, although Mr. Cambria claimed to be a figurehead Chairman of the Board, he nonetheless was apparently asked to start the restaurant and did so, hired the staff and an accountant; he stated that after the commencement of operations he hired and fired personnel in consultation with the manager; he supplied the restaurant with personally-owned equipment; and he had considerable experience in restaurant management. Mr. Cambria was therefore under a duty to act on the corporation's behalf for purposes of Articles 28 and 29 of the Tax Law.

D. That, in view of Mr. Cambria's disassociation with the corporation as of January 11, 1982 (Finding of Fact "15"), he was not under a duty to act on the corporation's behalf subsequent to that date. The Audit Division is therefore directed to adjust the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to Mr. Cambria to reflect his separation from the corporation as of January 11, 1982.

E. That the Audit Division improperly determined that petitioner Amelia Cambria was a person required to collect tax on behalf of the corporation within the meaning of section 1131(1) of the Tax Law. She was therefore not personally liable for the tax asserted against her herein.

The evidence presented indicates that Mrs. Cambria's involvement with the corporation was limited to her duties as an employee. Although treasurer of the corporation, she did not exercise any of the powers normally associated with that office, nor did she exercise her check-signing authority. She was in no way involved in the management of the corporation. Accordingly, Amelia Cambria was not under a duty to act for the corporation within the meaning of Article 28 of the Tax Law.

F. That the petition of Louis Cambria is granted to the extent indicated in Conclusion of Law "D"; the Audit Division is directed to adjust the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to Louis Cambria in accordance therewith; and, except as so granted, the petition of Louis Cambria is in all other respects denied.

G. That the petition of Amelia Cambria is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to Amelia Cambria is cancelled.

DATED: Albany, New York  
September 18, 1987

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ADMINISTRATIVE LAW JUDGE